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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

VICTOR FLORES, Plaintiff and Appellant, v. THE HOME DEPOT, INC., et al., Defendants and Respondents.	B204006 (Los Angeles County Super. Ct. No. BC352695)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County. Gregory W. Alarcon, Judge. Affirmed.

Law Offices of Lisa L. Maki, Lisa L. Maki, Christina M. Coleman, and Jill P. McDonell for Plaintiff and Appellant.

Orrick, Herrington & Sutcliffe, Lynne C. Hermle and Tracy L. Scheidtmann for Defendants and Respondents.

Victor Flores filed a putative class action against Cover-All, Inc. (Cover-All), Home Depot, Inc., and Home Depot U.S.A., Inc. (collectively Home Depot), alleging wage and overtime violations. Flores contended that Cover-All and Home Depot were joint employers. The trial court granted summary judgment in favor of Home Depot. On appeal, Flores contends that the trial court abused its discretion by: (1) refusing to continue the summary judgment motion to allow further discovery under Code of Civil Procedure section 437c, subdivision (h);[1] (2) denying Flores's motion to compel discovery from Home Depot as moot; and (3) denying Flores's motion for leave to amend his complaint. We affirm the judgment and orders.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2006, Victor Flores, a former Cover-All employee, filed a class action against Cover-All and Home Depot. The complaint alleged that the defendants failed to pay overtime wages and engaged in other unfair wage practices. According to the complaint, Cover-All claims "to be the nation's largest full service flooring installation and refinishing contractor; it claims to support the defendants Home Depot by providing residential installation services at over 300 Home Depot stores throughout the United States." The complaint contended that Home Depot and Cover-All engaged in joint business activities and that the "economic realities of the relationship between Cover-All and Home Depot" made them liable as joint employers of the plaintiffs.

Flores filed an amended complaint a few days after initiating the action. In early July 2006, Home Depot demurred to the first amended complaint. Home Depot demurred to each cause of action, arguing that Flores had not set forth facts necessary to show that Home Depot was a joint employer with Cover-All.

In August 2006, Flores filed a second amended complaint and Home Depot withdrew its demurrer. In October 2006, the trial court set the case for trial beginning September 25, 2007. Flores attempted to settle the case, including through mediation, but

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

the parties did not agree to stay discovery pending mediation. A mediation was scheduled for early February 2007 and then delayed until April 23, 2007. The case did not settle.

On April 27, 2007, Flores served a first set of requests for production of documents on Home Depot and Cover-All. Because Flores's counsel's office was out of state, and the requests were served by mail, responses were not due until 40 days after they were served. (Code Civ. Proc., §§ 1013, 2016.050, 2031.030, subd. (c)(2).) On June 6, 2007, Home Depot and Cover-All responded to the document requests. The responses contained numerous objections and were not accompanied by documents. Home Depot proposed that it would produce one category of documents upon the entry of a stipulated protective order. Between June 6 and July 10, 2007, counsel met and conferred by letter and telephone regarding the defendants' discovery responses and the proposed stipulated protective order. The parties were unable to resolve the discovery disputes.

In the meantime, on June 8, 2007, Home Depot filed a motion for summary judgment. Home Depot argued that Flores could not establish that Home Depot was his joint employer under any applicable legal test. In support of the motion, Home Depot attached the declaration of Home Depot's Director of National Services, Tony Zarvou.[2] Zarvou declared that Home Depot was not involved in recruiting, interviewing, hiring, firing, disciplining, or training Cover-All employees. Zarvou stated that Home Depot did not compensate Cover-All's installers in any way and did not determine the method or rate of payment Cover-All provided to the installers. Home Depot did not keep track of the number of hours individual installers worked. Moreover, Home Depot did not provide or own the flooring Cover-All installed in customer homes, or the tools Cover-

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[2] Flores's counsel only orally objected to the Zarvou declaration for the first time at the hearing on the summary judgment motion, but failed to request or obtain a ruling on the objections. Thus, any objections to the declaration are waived and we will consider the declaration on appeal. (*Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1243-1244, fn. 2.)

All employees used. The installers worked exclusively in customer homes and had no contact with Home Depot stores.

According to Zarvou, Home Depot required that Cover-All installers doing jobs for Home Depot pass a criminal background check conducted by a third-party. If the installer did not pass the background check, Zarvou stated, Home Depot had no authority to prevent Cover-All from employing the installer in other capacities, including on Home Depot work that did not include going into a customer's home. Zarvou further declared that Home Depot did not manage the details of Cover-All's installation work, such as how many installers would be used on any installation, the work schedules of the installers, or the day-to-day management or supervision of individual installers. If Home Depot received a customer complaint about an installation, it contacted Cover-All's management to ensure that the issue was handled appropriately. Home Depot also performed quality assurance checks on a random basis on a small proportion of the total installation jobs.

On July 11, 2007, Flores sought leave to file a third amended complaint. Flores proposed to amend his claim under Business and Professions Code section 17200 to include allegations that the defendants had violated the Federal Labor Standards Act (FLSA), and Labor Code section 2810.[3] The Labor Code section 2810 allegation would assert that Home Depot "either knew or should have known that its contract with the defendant [Cover-All] did not include sufficient payments by Home Depot to comply with the requirements of that statute and properly compensate the plaintiff and the class

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[3] Under Labor Code section 2810, subdivision (a), "[a] person or entity may not enter into a contract or agreement for labor or services with a construction, farm labor, garment, janitorial, or security guard contractor, where the person or entity knows or should know that the contract or agreement does not include funds sufficient to allow the contractor to comply with all applicable local, state, and federal laws or regulations governing the labor or services to be provided." "An action under this section may not be maintained unless it is pleaded and proved that an employee was injured as a result of a violation of a labor law or regulation in connection with the performance of the contract or agreement." (Lab. Code, § 2810, subd. (g)(1).)

as required by law. . . ." In support of the motion, Flores's counsel submitted a declaration explaining:

> "This need to amend the Complaint is based in part on defenses which have been asserted by defendant in this litigation. Based upon a good faith belief that Defendants would participate meaningfully in settlement discussions, I did not file this motion a few months sooner in the hope this matter would settle and the amendment would become unnecessary. These settlement discussions have been unsuccessful, so this motion is now necessary and justified. Further, since the basis of this claim is the same facts previously asserted, this will not affect the progression of discovery and will not affect trial preparation. The relationship between Home Depot and Cover-All is at issue under both the current complaint and the proposed Third Amended Complaint. The later will only (possibly) interject issues of law, not issues of fact, regarding that relationship into this litigation. Accordingly, allowing this amendment will not prejudice defendants in any fashion."

On July 12, 2007, Flores filed an ex parte application to continue the trial and related dates. He also filed motions to compel further responses from the defendants to his requests for production of documents, and an ex parte application for an order to shorten the notice period for the hearing on his motions to compel, as well as for the motion for leave to amend. On July 12, the trial court granted the ex parte motion to advance the hearing on the motions to compel and motion for leave to amend from August 24 to July 23, 2007. The court postponed hearing the ex parte application to continue the trial date until the July 23 hearing.

At the July 23 hearing, the trial court continued the trial to December 26, 2007. On the motion to compel, the court determined that the parties had not engaged in a good faith attempt to informally resolve the discovery disputes. The court ordered the parties to meet and confer and submit a Joint Statement of Items Remaining in Dispute before August 13, 2007. On its own motion, the court ordered counsel to meet and confer in person before filing any future discovery motions.

In August 2007, Flores opposed Home Depot's motion for summary judgment. He argued that an "economic realities" test should be applied to determine whether Home Depot was Flores's joint employer, rather than a test focused on "control." In support of

the opposition, Flores attached a declaration from a former Cover-All assistant manager, Venus Castro, who worked for Cover-All from 2002 until 2006.[4] Castro declared that she had primarily worked for Cover-All in Nevada, but spent about six weeks in 2005 working for the company in California. According to Castro, at least 95 percent of Cover-All's business came from Home Depot. Because Cover-All had relatively little non-Home Depot work, it could not hire employees who would only work on non-Home Depot business. Castro indicated that Home Depot did not directly instruct Cover-All to terminate particular installers, but if Home Depot complained enough about any individual installer's work, Cover-All would fire the installer. Castro further declared that in "perhaps" five percent of Cover-All's installation jobs, Cover-All assigned larger installation crews to a particular project at Home Depot's request. On scheduling issues, Castro indicated that Home Depot required Cover-All to perform installations Monday through Saturday, as dictated by the companies' contract. However, in her experience, when Home Depot asked Cover-All to perform an installation on an evening or Sunday, Cover-All agreed. Castro declared that on occasion, Home Depot also asked Cover-All to cancel one installation to perform another job first.

In his separate statement of disputed facts, Flores conceded that many of Home Depot's facts in support of summary judgment were undisputed, including that Home Depot did not compensate Cover-All's installers or monitor the hours they worked, and that Home Depot had no knowledge of how Cover-All installers were compensated.

Flores also argued that the trial court should deny the summary judgment motion under section 437c, subdivision (h). Flores contended that Home Depot and Cover-All had refused to provide "critically relevant" discovery. In an accompanying declaration, Flores's counsel identified three categories of information the defendants had refused to

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[4] The trial court sustained the majority of Home Depot's written and timely submitted objections to the Castro declaration. We do not discuss or consider the portions of the declaration that were excluded. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.)

provide: (1) the percentage of Home Depot's flooring product sales in California that were accompanied by the sale of installation services; (2) documents detailing what Home Depot determined it should properly pay for flooring installation services, what it would cost Home Depot to provide such services itself, and what prices other contractors offered Home Depot to provide installation services; and (3) documents from Cover-All detailing the total amount of revenue it received from its work for Home Depot as a portion of its total revenue. The second and third categories were subjects of Flores's motions to compel. But Flores had requested the first category of information in a first set of special interrogatories. Home Depot objected to the interrogatories in a July 31, 2007 response, and Flores had not moved to compel further responses.

On August 24, 2007, the trial court granted Home Depot's motion for summary judgment. The court found that Flores had not raised a triable issue of material fact on the joint employer question, and concluded that Home Depot was not a joint employer with Cover-All. The court noted that Flores conceded that 37 of Home Depot's 54 undisputed facts supporting summary judgment were undisputed. The court further found that the absence of disputed material facts about Home Depot's alleged joint employer status negated Flores's causes of action under Business and Professions Code section 17200, since Flores could not prove a violation of any underlying statute.

The court also denied Flores's motion for leave to file a third amended complaint. The court explained that it was "at a loss to comprehend the reasons why [Flores] believed he did not have to file the amendment sooner. This was filed as a class action which has not yet been certified as such. Plaintiff's attorney claims he did not amend the complaint in the hopes that the case would settle. However, [Plaintiff's attorney] provides no dates as to when the facts given rise to the amendment were discovered. This violates the mandatory provisions of [California Rules of Court, rule] 3.1324 and the Court must deny the motion." In addition, the trial court concluded that the grant of

summary judgment rendered Flores's motion to compel further discovery responses from Home Depot moot.[5]

This appeal followed.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion in Denying a Continuance Under Section 437c, subdivision (h)

Flores's sole argument challenging the order granting summary judgment is that the trial court abused its discretion by refusing to continue the case to allow for additional discovery. We disagree.[6]

Under Section 437c, subdivision (h): "If it appears from the affidavits submitted in opposition to a motion for summary judgment or summary adjudication or both that facts essential to justify opposition may exist but cannot, for reasons stated, then be presented, the court shall deny the motion, or order a continuance to permit affidavits to be obtained or discovery to be had or may make any other order as may be just." "The statute mandates a continuance of a summary judgment hearing upon a good faith showing by affidavit that additional time is needed to obtain facts essential to justify opposition to the motion. [Citations.] Continuance of a summary judgment hearing is not mandatory, however, when no affidavit is submitted or when the submitted affidavit fails to make the necessary showing under section 437c, subdivision (h). [Citations.] Thus, in the absence of an affidavit that requires a continuance under section 437c, subdivision (h), we review the trial court's denial of appellant's request for a continuance for abuse of discretion." (*Cooksey v. Alexakis* (2004) 123 Cal.App.4th 246, 253-254

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[5] The trial court also granted Cover-All's motion for a stay pending final disposition of criminal proceedings against it. The stay included Flores's motion to compel further discovery responses from Cover-All.

[6] The trial court implicitly denied the request for a continuance in granting the motion for summary judgment. (*Combs v. Skyriver Communications, Inc.* (2008) 159 Cal.App.4th 1242, 1270 (*Combs*).)

(*Cooksey*).) "Notwithstanding the court's discretion in addressing such continuance requests, 'the interests at stake are too high to sanction the denial of a continuance without good reason.' [Citation.]" (*Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 100 (*Knapp*).)

A. The Declaration Offered in Support of the Request Did Not Establish a Basis for a Continuance

A declaration offered in support of a request for continuance under section 437c, subdivision (h) must show: " '(1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]' [Citation.]. . . . ' "It is not sufficient under the statute merely to indicate further discovery or investigation is contemplated. The statute makes it a condition that the party moving for a continuance show "facts essential to justify opposition may exist." ' [Citation.]" (*Cooksey, supra,* 123 Cal.App.4th at p. 254.)

Flores offered only the declaration of his counsel to address the need for a continuance. The declaration did nothing more than state that Flores had requested certain discovery that Home Depot and Cover-All had not provided. It did not detail what essential facts may exist and could be obtained with additional time. Nor did it explain why such discovery could not have been completed earlier. The declaration thus failed to establish that more time was needed to obtain facts "essential" to justify opposition to the motion. A continuance was not mandated under section 437c, subdivision (h). (*Combs, supra,* 159 Cal.App.4th at p. 1270; *Cooksey*, *supra*, 123 Cal.App.4th at p. 255; *Scott v. CIBA Vision Corp.* (1995) 38 Cal.App.4th 307, 326.)

Moreover, for the reasons discussed below, even if we consider the arguments Flores made in the opposition brief (as opposed to the declaration) we conclude that the trial court did not abuse its discretion.

B. Lack of Diligence

Several courts of appeal, including those of this appellate district, have concluded that "lack of diligence may be a ground for denying a request for a continuance of a summary judgment motion hearing. . . . There must be a justifiable reason why the essential facts cannot be presented. . . . A good faith showing that further discovery is needed to oppose summary judgment requires some justification for why such discovery could not have been completed sooner." (*Cooksey*, *supra*, 123 Cal.App.4th at p. 257 [collecting cases].) Here, neither the declaration from Flores's counsel nor the opposition itself explained why the requested discovery could not have been completed sooner.

Flores argues that he in fact acted diligently, and his delay resulted from the parties' efforts to settle and Home Depot's obstruction of discovery. In Flores's briefing in connection with his other motions, his counsel asserted that the February 2007 mediation date was delayed by over a month and created understandable delay in the case. However, discovery could take place with mediation pending. Further, Flores offered no explanation for the lack of activity in the case between May 2006, when the case was filed, and February 2007. In October 2006, the court set a September 2007 trial date, but Flores still did not serve Home Depot with discovery until April 2007. When Flores finally served discovery, he served only requests for production of documents, and apparently did not serve interrogatories until a later date, despite the short time period available for discovery. Further, the record does not indicate that Flores ever noticed a deposition of Home Depot. Nor does the record reflect that Flores pursued other avenues of securing information—for example, Flores did not attach the declaration of a single Cover-All installer in opposition to the summary judgment motion, or even his own declaration. (See *Knapp*, *supra*, 123 Cal.App.4th at p. 102.)

The trial court could reasonably conclude that Flores's actions demonstrated a lack of diligence and accordingly deny the section 437c, subdivision (h) continuance.

C. Discovery Related to the Proposed Third Amended Complaint's Allegations Was Not Essential

Moreover, at least some of the discovery Flores wanted additional time to complete was not essential to the opposition to the summary judgment motion. One of Flores's outstanding categories of discovery concerned whether "Home Depot knew or should have known that Cover-All was providing Home Depot with flooring installation labor for rates that were below the minimum standards required by California law." This category was not focused on discovery of essential facts to support Flores's argument that Home Depot was a joint employer. Rather, it related to the Labor Code section 2810 allegation of Flores's proposed third amended complaint, which was not the subject of the summary judgment motion. Only the third amended complaint included a theory that Home Depot was liable for reasons beyond its alleged joint employer status. This category of information would not produce facts essential to justify opposition to Home Depot's motion seeking summary judgment of the *second* amended complaint. (*Ace American Ins. Co. v. Walker* (2004) 121 Cal.App.4th 1017 [continuance properly denied where the discovery sought did not relate to the material issue in summary judgment motion]; *Knapp, supra,* 123 Cal.App.4th at pp. 101-102.)

D. Even if the Trial Court Erred in Denying the Continuance the Error Would Be Harmless

Even if the trial court erred in denying Flores's request for a continuance with respect to the remaining two categories of outstanding discovery, we would find the error harmless. The discovery identified in Flores's opposition would not have enabled him to defeat summary judgment on the joint employer issue.

Flores's claimed need for the two other categories of discovery was connected to the question of what factors the court should consider to determine whether a joint employment relationship existed. Flores argued that the trial court should apply an "economic realities" test, developed primarily in federal caselaw to analyze joint employment under the Federal Labor Standards Act (FLSA). (See *Rutherfood Food*

Corp. v. McComb (1947) 331 U.S. 722; *Zheng v. Liberty Apparel Co. Inc.* (2d Cir. 2003) 355 F.3d 61 (*Zheng*).)[7]

Although courts have adopted varying sets of factors to determine whether a joint employment relationship exists, nearly every analysis states that no single factor controls. For example, in *Vernon*, the court recognized that "'[t]here is no magic formula for determining whether an organization is a joint employer. Rather, the court must analyze "myriad facts surrounding the employment relationship in question." [Citation.] No one factor is decisive. [Citation.]' [Citations.]" (*Vernon, supra,* 116 Cal.App.4th at pp. 124-125.) The *Vernon* court advised that to determine whether a joint employment relationship exists under FEHA, the court should consider "payment of salary or other employment benefits and Social Security taxes, the ownership of the equipment necessary to performance of the job, the location where the work is performed, the obligation of the defendant to train the employee, the authority of the defendant to hire, transfer, promote, discipline or discharge the employee, the authority to establish work schedules and assignments, the defendant's discretion to determine the amount of compensation earned by the employee, the skill required of the work performed and the extent to which it is done under the direction of a supervisor, whether the work is part of the defendant's regular business operations, the skill required in the particular occupation, the duration of the relationship of the parties, and the duration of the plaintiff's employment." (*Id.* at p. 125.)

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[7] Home Depot argued that the court should apply factors developed in California cases analyzing whether an employment relationship exists in other statutory contexts. These cases describe the joint employment test as one with several factors, but they emphasize the putative joint employer's control over employees as a key element. (See *Vernon v. State of California* (2004) 116 Cal.App.4th 114, 125-126 (*Vernon*); *United Public Employees v. Public Employment Relations Bd.* (1989) 213 Cal.App.3d 1119, 1128.) No California court has explicitly addressed what test should be used to determine whether a joint employment relationship exists in an action alleging violations of the California Labor Code.

Similarly, in *Zheng*, the Second Circuit Court of Appeals stressed that "'economic reality is determined based upon *all* the circumstances, [and] any relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition.' [Citation.]." (*Zheng*, *supra*, 355 F.3d at p. 71.) The court instructed that to apply the "economic reality" test, the lower court should consider whether the putative joint employer's premises and equipment were used for the employees' work; the degree to which the joint employer supervised the employees' work; whether the contractor employer had a business that could or did shift as a unit from one putative joint employer to another; whether the employees worked exclusively or predominantly for the putative joint employer; the extent to which the employees performed a "discrete line-job" that is integral to the putative joint employer's process of production; and whether the same employees would continue to do the same work in the same place, regardless of the contractor employer's presence. (*Id.* at p. 72) Within those factors, the court suggested that industry custom and historical practice be consulted.[8] (*Id.* at p. 73.)

Flores's opposition to summary judgment and supporting attorney declaration identified only three categories of "highly relevant disclosures" in support of the section 437c, subdivision (h) request. Of those categories, Flores connected only two of them to joint employment factors: whether installers worked exclusively or predominantly for Home Depot, and the extent to which installers performed a discrete "line-job" that was

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[8] In a case Flores primarily relied upon, *S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, our Supreme Court also identified a list of factors a court should consider when determining whether a plaintiff is an employee or an independent contractor. The court instructed that in addition to the alleged employer's right to control the work and employees, courts should also consider: "(1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. (*Real* v. *Driscoll Strawberry Associates, Inc*. (9th Cir. 1979) 603 F.2d 748, 754 [Fair Labor Standards Act].)" (*Id*. at p. 355.)

integral to Home Depot's "process of production." (*Zheng, supra,* 355 F.3d at p. 72.) But Flores neither produced evidence nor referenced outstanding discovery that would elicit facts to favorably prove *any* of the other numerous factors to be considered under any of the joint employer tests. What evidence Flores had at the time of summary judgment relevant to joint employment either went against him or failed to prove his point.[9]

Flores notably did not argue that a continuance was needed to obtain facts that would establish joint employment under any other factors than the two he identified. Even if Flores had additional discovery to establish facts in his favor on the two narrow factors he identified, those facts alone would not be enough to refute Home Depot's argument that it was not a joint employer.[10] In the complete absence of other evidence to create a picture of joint employment, the three categories of discovery Flores identified would not have made a difference in his opposition to summary judgment. That the trial court did not grant a continuance to pursue that discovery could only be harmless error.

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[9] For example, Castro declared that Home Depot did not directly instruct Cover-All to fire installers. Instead, according to Castro, if Home Depot complained enough Cover-All took it upon itself to terminate a problem installer. This statement demonstrates Home Depot's affirmative lack of control over the installers. Castro's declaration describes a relationship between Cover-All and Home Depot, but fails to suggest that the installers themselves were meaningfully connected to Home Depot. We note that in *Zheng,* the court cautioned that the lack of a broad client base is not a perfect proxy for joint employment because it is also consistent with a legitimate subcontracting relationship. (*Zheng, supra,* 355 F.3d at p. 72). The court further noted that "supervision with respect to contractual warranties of quality and time of delivery has no bearing on the joint employment inquiry, as such supervision is perfectly consistent with a typical, legitimate subcontracting arrangement." (*Id.* at p. 75.)

[10] We also note that Flores introduced some evidence on the question of whether Cover-All installers performed jobs primarily for Home Depot. The trial court overruled objections to a portion of the Castro declaration stating that 95 percent or more of Cover-All's business was for Home Depot customers.

II. The Trial Court Did Not Abuse Its Discretion By Denying Flores's Motion for Leave to Amend the Complaint

After Home Depot filed its summary judgment motion, Flores sought leave to amend his complaint a third time. The amendment would have expanded his claims under Business and Professions Code section 17200 to allege that Home Depot's unlawful acts included violations of FLSA and Labor Code section 2810. The trial did not abuse its discretion in denying the proposed amendment.

" ' "[T]he trial court has wide discretion in allowing the amendment of any pleading [citations], [and] as a matter of policy the ruling of the trial court in such matters will be upheld unless a manifest or gross abuse of discretion is shown. [Citations.]" ' [Citation.] Nevertheless, it is also true that courts generally should permit amendment to the complaint at any stage of the proceedings, up to and including trial. [Citations.] But this policy applies ' "only '[w]here no prejudice is shown to the adverse party.' " ' [Citation.] Moreover, ' " 'even if a good amendment is proposed in proper form, unwarranted delay in presenting it may-of itself-be a valid reason for denial.' " ' [Citations.] Thus, appellate courts are less likely to find an abuse of discretion where, for example, the proposed amendment is ' "offered after long unexplained delay . . . or where there is a lack of diligence . . . ." ' [Citation.]" (*Melican v. Regents of the University of California* (2007) 151 Cal.App.4th 168, 175 (*Melican*).)

Here the trial court reasonably could find that Flores demonstrated a lack of diligence in his delay in seeking leave to amend the complaint. As early as July 2006 when Home Depot demurred to the complaint, Flores was on notice that Home Depot would defend against his claims by arguing that it could not be liable as a joint employer. Despite this early indication of Home Depot's defenses, Flores amended his complaint after the demurrer was filed without including any claims or allegations that would establish an alternative basis for Home Depot's liability. He did not seek leave to amend a third time until almost one year later, and only after Home Depot had filed its motion for summary judgment. His only explanation for the delay was that he hoped to settle the case.

Further, while Flores asserted that the amendment would not introduce any new factual issues to be litigated, this was at least partially inaccurate. The allegation that Home Depot had also violated FLSA could be based on the same facts as the complaint's other claims.[11] However, the allegation that Home Depot violated Labor Code section 2810 inserted an entirely new theory into the litigation. Rather than arguing that Home Depot was simply a joint employer with Cover-All, the Labor Code section 2810 allegation asserted that Home Depot knew or should have known that its contract with Cover-All did not provide sufficient funds for Cover-All to pay overtime to the installers. This theory would require evidence of Home Depot's knowledge as well as its actions. Proving the theory would also require that Flores establish that the Cover-All/ Home Depot contract was covered by Labor Code section 2810, which applies only to contracts or agreements for labor or services with a construction, farm labor, garment, janitorial, or security guard contractor. (Lab. Code, § 2810, subd. (a).) Previous iterations of the complaint did not contain a similar theory of liability or factual allegations to support *any* theory other than that Home Depot was a joint employer.

Moreover, Flores had no new or additional evidence to support the Labor Code section 2810 allegation. Instead, in his opposition to summary judgment, Flores requested a continuance so that he could obtain facts to support the new theory. (Cf. *Rojas v. Brinderson Constructors Inc.* (C.D. Cal. 2008) 567 F.Supp.2d 1205 [granting motion to dismiss Labor Code section 2810 claim where complaint alleged only speculative facts and denying leave to amend].) As in *Melican*, the trial court could reasonably conclude that "[i]t would be patently unfair to allow plaintiffs to defeat [defendant's] summary judgment motion by allowing them to present a 'moving target' unbounded by the pleadings." (*Melican, supra,* 151 Cal.App.4th at p. 176; *Huff v. Wilkins* (2006) 138 Cal.App.4th 732, 746; cf. *Magpali v. Farmers Group, Inc.* (1996)

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[11] For this reason, the amended claim would have been subject to the same analysis the trial court applied to the rest of the complaint, and therefore dismissed on summary judgment.

48 Cal.App.4th 471, 486-487 [no abuse of discretion where court denied leave to amend complaint on eve of trial when amendment would change tenor and complexity of complaint].)

The court was vested with the discretion to determine whether to allow the amendment. We conclude that the trial court did not "exceed the bounds of reason" when it denied Flores leave to amend the complaint. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

III. The Trial Court Did Not Abuse Its Discretion By Denying Flores's Motion to Compel Discovery

Flores asserts that even though the trial court granted summary judgment, it should still have granted his motion to compel Home Depot to provide further responses to his requests for production of documents. He contends that since the litigation would eventually continue against Cover-All, the discovery was relevant and could have been compelled. We disagree that the trial court abused its discretion.

" 'Management of discovery generally lies within the sound discretion of the trial court. [Citations.] Where there is a basis for the trial court's ruling and it is supported by the evidence, a reviewing court will not substitute its opinion for that of the trial court. [Citation.]' " (*Toshiba America Electronic Components v. Superior Court* (2004) 124 Cal.App.4th 762, 767-768.) "Under this standard, the superior court's determination will be set aside only when it has been demonstrated that there was no legal justification for the order denying the discovery requested." (*Ochoa v. Fordel, Inc.* (2007) 146 Cal.App.4th 898, 912; *Tien v. Superior Court* (2006) 139 Cal.App.4th 528, 535.)

We understand Flores's frustration that Home Depot was dismissed from the case before it turned over documents it had agreed to produce, subject to a disputed protective order. Yet, Flores asserts only that the trial court *could have* resolved the disputed issues in the protective order, not that the court's decision not to do so lacked legal justification. Once the court granted Home Depot's motion for summary judgment, Flores's discovery requests to Home Depot as a party were no longer effective. In its discretion to manage discovery, the trial court could reasonably deny the motion to compel as moot, leaving

Flores to seek discovery from Home Depot as a third party. Although this ruling may lead to some duplication of efforts, Flores has not demonstrated that it was an abuse of discretion.

DISPOSITION

The judgment and orders are affirmed. Respondents are to recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, J.

We concur:

FLIER, Acting P. J.

O'NEILL, J.*

* Judge of the Ventura Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.